Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-670

SECOND AVENUE LIMITED DIVIDEND HOUSING ASSOCIATION, et al,

PETITIONERS,

v.

CARLA ANDERSON HILLS, Secretary Department of Housing and Urban Development, et al,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in this above case.

OPINIONS BELOW

The opinion of the District Court (App. A, infra, pp. 1-46) is unreported. The opinion of the Court of Appeals for the Sixth Circuit (App. B, infra, p.47) is unreported and its decision denying rehearing (App. C, infra, p. 49) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was made and entered on April 8, 1976, and a timely petition for rehearing en banc was denied on May 25, 1976. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Whether Petitioners are entitled to have the District Court decide the merits of the disputes of the particular issues alleged in their First Amended Complaint?

II. Whether the District Judge's determinations that the Court lacked jurisdiction and that the First amended Complaint failed to state causes of action are fatally incompatible?

III. Whether the District Judge's determination that Count XII of the First Amended Complaint failed to state causes of action, on the authority of Parker v. Brown, 317 U.S. 341, that the "governmental agencies and officers do not fall within the purview of the anti-trust laws," is clearly erroneous?

IV. Whether the District Court erred in dismissing Petitioner's First Amended Complaint on the pleadings findings that Petitioners did not have standing to bring the suit and that the First Amended Complaint did not state causes of action upon which relief can be granted?

V. Whether the District Court erred in determining the standard applicable in testing the sufficiency of the First Amended Complaint for subject matter jurisdiction?

CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL RULES INVOLVED

The pertinent portions of the Fifth, Ninth, Thirteenth, and Fourteenth Amendments to the Constitution of the United States, laws of the United States and Federal Rules of Civil Procedure, to wit:

(5 U.S.C. 702), (12 U.S.C. 1702), (28 U.S.C. 1331, 1343(3) and (4), (42 U.S.C. 1981, 1982, 9183 and 1985), (42 U.S.C. 200d), (42 U.S.C. 3605 and 3612), (42 U.S.C. 3939), Fed.R.Civ.P. Rules 12(b) (1) and 12(b)(6), 28 U.S.C.A. set forth in App. D at pp. .

STATEMENT OF THE CASE

The First Amended Complaint

The District Court action was brought by three sets of Plaintiffs.

Second Avenue, a Michigan Limited Partnership, was organized pursuant to the Michigan Uniform Partnership Act and the State Housing Development Authority Act of Michigan. The organization and operation of Second Avenue was and is supervised by the Michigan State Housing Development Authority

("MSHDA"). Second Avenue is a limited dividend partnership among whose purposes is to rehabilitate and develop the Second-Hendrie Project for low and moderate income persons and social, recreational, commercial and communal facilities for its tenants. All of Second Avenue's members are Black Persons. Second Avenue is a participant and recipient under the federally assisted programs.

Hood is a member, limited partner and general partner of Second Avenue, is a Black Person, a resident and taxpayer of Detroit. Eley is a Black Person, a former tenant and displacee of the Second-Hendrie Project, a qualified applicant for the Second-Hendrie Project, and is a resident of Detroit. White is a principal shareholder and officer of U.H. Construction, is a Black person, a resident and taxpayer

of Detroit, and is an owner of real property in Detroit.

U.H. Construction is the general contractor of the Second-Hendrie Project and general partner of Second Avenue.

The District Court action was brought against three sets of Defendants.

The Federal Defendants are the Secretary of Treasury, the Secretary of Housing and Urban Development, the Director of the Office of Management and Budget, the Department of Housing and Urban Development ("HUD"), and the Federal Housing Administration ("FHA").

The State Defendants are the Governor of the State of Michigan, the Director of the Department of Social Services and Chairman of MSHDA, and the Executive Director of the Michigan State Housing Development

Authority ("MSHDA").

The Private Defendants are Citizens Mortgage Corporation of Delaware (co-mortgagee and servicing agent), Citizens Mortgage Corporation of Michigan (co-mortgagee and servicing agent), Lawyers Title Insurance Corporation (title insurer of mortgage interest), Continental Wingate (housing consultant to MSHDA and the Second-Hendrie Project), Manufacturers Hanover Corporation (parent of Citizens of Michigan and Delaware), Metropolitan Detroit Citizens Development Authority ("MDCDA") (contract relocator of displacees of Second-Hendrie Project), and New Detroit, Inc. (controller of MDCDA).

The HUD, FHA, MSHDA Partnership alleged in the First Amended Complaint.

In 1970 MSHDA and the Governor of Michigan entered into a partnership

with HUD, RHA and the then Secretary of HUD to create a rehab multi-family residential program (including the Second-Hendrie Project) in the City of Detroit known as Project Rehab, and to create employment for blacks and agreed to insure the success of the program.

The Entire Agreement alleged in the First Amended Complaint.

Pursuant to the federal and state partnership and prior to December, 1971, Second Avenue, Hood and U.H. Construction entered into the Entire Agreement with MSHDA, HUD, FHA, Citizens, Lawyers Title, Continental Wingate et al, to finance, insure, rehabilitate, develop and manage the Second-Hendrie Project.

Accepting the allegations of the First Amended Complaint as true, Petitioners personally sustained injuries in fact

Petitioners' First Amended Complaint

charge Respondents with discriminatory practices in the administration of § 236 (Rehab Detroit) Housing Projects, including the Second-Hendrie Project (¶ 46, 49, 60 and 62) and also charge that Respondents violated their statutory duties, exceeded and abused their statutory powers and authority, and breached their contractual commitments, inter alia, in failing: to relocate the displaced tenants of Second-Hendrie Project including Eley (¶ 17, 18, 43, 46, 47, 48, 60 and 81), to rehabilitate the Second-Hendrie Project, to provide employment to Petitioners and other blacks, to insure the success of the Second-Hendrie Project, deprivation of Petitioners' constitutional, contract and civil rights, to prevent imposition of onerous conditions on U.H. Construction making it impossible to complete the

construction (¶ 34, 37, 38 and 39), to grant a mortgage increase to Second Avenue (due to construction cost overruns) while granting mortgage increases to all other rehab projects (¶ 48) [although all the MSHDA financed rehab projects were in default, MSHDA discriminatorily and foreclosed on Second Avenue (¶ 48 and 76)], to honor approved construction draws thereby stopping construction (¶ 34, 35, 39, 40 and 77) and forcing U.H. Construction to use unskilled laborers thereby causing work to be redone and increasing construction costs (¶ 38, 76 and 77), to abide by its agreement regarding the moratorium on mortgage foreclosures (¶ 35, 37, 48 and 76), to cooperate in good faith in the workout agreement and refused to grant a mortgage increase (¶ 34, 38, 39, 40, 44 and 76), to

provide decent housing for the displaced tenants of the Second-Hendrie Project and the Detroit Project Rehab, including Eley (¶ 17, 18, 43, 46, 47, 48, 60 and 81), and to prevent the illegal siphoning off of exorbitant funds for purchase of the sites (including Second-Hendrie) from white absentee landlords.

Second Avenue, U.H. Construction, White and Hood claim in their First Amended Complaint that they have suffered and sustained injuries: (Count I) deprivation of right to participate in the HUD/MSHDA assisted programs and right to carry on business in a free enterprise system (¶ 66(d)), subjection to a foreclosure and receivership action (¶ 69), deprivation of contract rights and economic opportunities and loss of profits, investment, title to real estate and opportunity to pursue

business and subjection to claims from its limited partners (¶ 69), and marked and labeled as undesirable risks and blackmarked in further participation in MSHDA/HUD projects (¶ 69).

Eley and the class members represented by Eley, White, Hood and Second Avenue, claim in their First Amended Complaint that they have suffered and sustained injuries: (Count I), deprivation of safe and sanitary dwellings (¶ 64 and 66), suffered invasion of right of privacy and individual dignity (¶ 64 and 66), deprivation of their constitutional rights of due process and equal protection afforded under the Fifth, Ninth, Thirteenth and Fourteenth Amendments to the United States Constitution (¶ 68 and 69), and as a result of alleged discrimination, loss of social bene-

fits of living in an integrated community and economic damage in social, business and professional activities from living in the Black ghetto (¶1, 64-69).

Second Avenue, U.H. Construction, White, Hood, Eley and the class members they represent claim in their First Amended Complaint that they have suffered and sustained injuries (Count III) as stated in the immediately foregoing paragraph, (Count IV) deprivation of decent housing and equal protection under the laws, deprivation of property and personal rights without due process of law (¶ 99), and deprivation of rights and interest afforded under the rehab program (¶ 104), Count V) damages and economic loss to their professional names, credit, reputations and business (¶ 113) and legal personal

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and property rights afforded under the equal protection and due process clauses, (Count VI) as a result of discrimination, they have suffered embarrassment and economic damage in their business and personal activities from being stigmatized as residents of the Black ghetto (¶ 124), and that the state and county tax burdens have been increased (¶ 126), Count VII) deprivation of equal protection under the laws and due process of law by denial of participation in federally assisted programs, (Count XI) humiliation, nervous shock and embarrassment by reason of the stigma associated with residence in the Black ghetto (¶ 171), (Count XII) destruction of their business and good will (¶ 185), deprivation of right to carry on their business (¶ 185), and loss of real estate, business property and profits

and damage to their reputation and good will.

In 1975, Petitioners brought a private action and a public action against certain federal and state agencies and officials and certain private corporations for alleged violations of the federal and State of [illegible] housing, securities, anti-trust and civil rights laws and Petitioners' civil and constitutional rights afforded under the Fifth, Ninth, Thirteenth and Fourteenth Amendments to the Constitution of the United States, seeking equitable relief and damages.

The First Amended Complaint filed by Petitioners invoked the Court's jurisdiction under 5 U.S.C. 702; 28 U.S.C. 1331(a), 1343(3) and (4), 1361; the Fifth, Ninth, Thirteenth and Fourteenth Amendments and Articles

I and II to the Constitution of the United States and the federal common law. Petitioners sought redress against Respondents for alleged violations and deprivation of rights, privileges or immunities afforded under 15 U.S.C. 1, 42 U.S.C. 1981, 1982, 1983, 1985, 2000d, 3605 and 3612.

Proceedings and Determinations of the District Court

On May 1, 1975, Second Avenue filed its Complaint in the District Court, Civil Action No. 75-70783.

On May 15, 1975, MSHDA filed a number of motions designated as follows: (1) Motion to Dismiss Under Rule 12(b) Fed.R.Civ.P., For Failure to State a Claim Upon Which Relief Can be Granted or for Lack of Subject Matter Jurisdiction; (2) Motion Under Rules 65, 12(b)(1), and 12(b)(6), to Deny Certain Equitable Relief and to

Strike and Dismiss Certain Prayers for Such Relief, or in the Alternative, to Require Adequate Security; (3) Motion, Under Rule 12, to Dismiss for Lack of Standing and Capacity; (4) Motion to Dismiss Because of Statute of Limitations, Laches, Waiver and Estoppel; (5) Motion Under Rule 11; and (6) Motion Pursuant to Rule 65 to Restrain Further Interference or Harassment of Issuance of Bonds. In support of these motions, MSHDA filed affidavits and other extra-pleading materials.

On May 22, 1975, Second Avenue filed its Ex parte Application to Enlarge Time for an Order enlarging the time for the hearing on MSHDA's motions. Also, on May 22, 1975, the District Court entered its Order Limiting Scope of Hearing on Michigan State Housing Development Authority's

Motions.

On May 27, 1975, Second Avenue et al filed with the District Court the original of the First Amended Complaint.

On May 27, 1975, Second Avenue et al filed with the District Court and served on Carla Anderson Hills et al's attorneys a Notice of Amended Complaint, First Amended Complaint, Jury Demand, General Reply to MSHDA's Motions, Brief in Support thereof and Motion to Strike Michigan State Housing Development Authority's Motions and supporting affidavits and papers.

On May 27, 1975, attorneys for Citizens Mortgage Corporation and Manufacturers Hanover Corporation filed their Notice of Appearance and also filed Motions for Dismissal of Certain Allegations and Declaration

of Support for Motions and Brief in support thereof.

During the proceeding before the Honorable Cornelia G. Kennedy on May 27, 1975, the District Court ruled that Second Avenue et al had a right to file a First Amended Complaint notwithstanding the addition of additional plaintiffs.

During the hearing on MSHDA et al's Motions on May 27, 1975, Second Avenue et al's counsel made a motion for leave to file a Second Amended Complaint in the event the Court granted any part or all of the relief sought by MSHDA et al's motions.

Although counsel for Second Avenue et al argued their motion to strike MSHDA's motions and supporting affidavits and papers on May 27, 1975, and requested the relief sought therein, the District Court failed to rule

on said motion and also failed to state any reason why it did not so rule.

On May 28, 1975, the District Court rendered its typewritten 13-page Opinion and Order Granting MSHDA et al's Motions to Dismiss and simultaneously therewith entered its Judgment Dismissing Action. (App. A, infra. pp. 1-46).

The District Court's Grounds for Dismissal of Counts I, II, III, IV, V, VI, VII, IX and X

The District Court, in dismissing Count I of the First Amended Complaint found (a) that the Petitioners, Second Avenue, Hood, Eley, U.H. and White lacked the requisite standing to raise the claims therein; (b) a failure to contain a short and plain statement of Petitioners' various claims showing that they are entitled to relief (App. A, infra. p. 12). MSHDA,

Citizens Mortgage Corporation and Manufacturers Hanover Corporation also argued in their brief on appeal that the District Court dismissed Count I based on its findings of lack of standing and the failure to state cognizable private causes of action.

Also MSHDA, Citizens and Manufacturers Hanover moved to dismiss the First Amended Complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. In addition, MSHDA, Citizens and Manufacturers Hanover asserted during the argument on their motion to dismiss that the District Court lacked jurisdiction over the subject matter of the action and that all Counts of the Complaint and First Amended Complaint failed to state claims upon which relief can be granted.

The District Court, in rendering its Opinion Dismissing Action and in entering its Judgment Dismissing Action concluded that it did not have jurisdiction over the subject matter of the action. (App. A, infra, pp. 12-25). However, in addition to, and notwithstanding the District Court's holding of a lack of subject matter jurisdiction, the District Court held that Petitioners Second Avenue, Hood, Eley, U. H. and White's Complaint failed to state claims upon which relief could be granted. (App. A, infra, pp. 16-37).

Proceedings and Determinations of the United States Court of Appeals, Sixth Circuit

On appeal, the Sixth Circuit (per Weick and Peck, Circuit Judges and Cecil, Senior Circuit Judge) affirmed the judgment of the District Court. (App. B, infra, p. 47).

In denying the Petition for Rehearing and Suggestion for Rehearing In Banc, the Sixth Circuit concluded that the petition for rehearing was without merit. (App. C, infra, p. 49).

REASONS FOR GRANTING THE WRIT

I

THIS CASE PRESENTS QUESTIONS OF GREAT IMPORTANCE RELATING TO THE ADMINISTRATION AND ENFORCEMENT OF THE FEDERALLY ASSISTED HOUSING PROGRAMS. ALSO, THE SIXTH CIRCUIT COURT'S DECISION OF AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT CLEARLY CONFLICTS WITH THE SEVENTH CIRCUIT COURT'S DECISIONS OF GAUTREAUX v. ROMNEY AND CAUTREAUX v. CHICAGO HOUSING AUTHORITY AND THE THIRD CIRCUIT COURT'S DECISION OF SHANNON v. HUD ON THE SAME MATTERS

Here, as was in Mahaley v. Cuyahoga Metropolitan Housing Authority et al, (6th Cir. 1974), this is a civil rights case attacking the growing evil of apartheid in Urban America.

The District Court dismissed the First Amended Complaint for lack of standing. Even a cursory reading of the opinion (App. A, infra, pp. 1-46) demonstrates that standing is not really the problem in this cause.

Commencing on the Supreme Court's decision in Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197 (1975), Irving Younger stated in his article titled "In Praise of Simplicity," 62 A.B.A.J. 632 (1976):

> "Read the (District Court) opinion and ask yourself whether standing is really the problem. I think you'll say no, the real problem is that the petitioners raised enormous sensitive issues of race and economic class the court was unwilling to face. It chose to avoid them by adding some very complicated wrinkles to the already vexed law to standing." (App. E, infra, pp.81-82).

Read the District Court's opinion (App. A, infra pp. 10 - 14) and ask yourself whether standing is really the problem in this case. Without

a doubt, the real problem is that Petitioners raised enormous sensitive issues of race and economics that the Court was unwilling to face. Instead, it chose to avoid them by erroneously exercising its discretion to purportedly enhance MSHDA's ability to sell its bonds (App. A, infra, pp. 10-12).

Messrs. Arych Neier and Burt Neuborne appropriately stated in the July/August 1976 Juris Doctor that the current Supreme Court decisions, including Warth v. Seldin, have made a mockery of the notion of direct and uncompelled access to federal courts and unless Congress reasserts its will, the current decisions bid fair to repeal 42 U.S.C. 1983 by judicial fiat. (App. E, infra, pp.68-77).

> Petitioners are entitled to have the District Court decide the merits of the disputes and the particular issues alleged in their

First Amended Complaint -- The principles of Hills v. Gautreaux are fully applicable to the instant case

This case presents a similar and, in many respects, an exact parallel of facts which faced the Supreme Court in Hills v. Gautreaux, _____ U.S. _____, 95 S.Ct. 204 (1975). Here, as in Hills, Petitioners (especially Eley, a former tenant and applicant for federally assisted housing) brought a "public" and "private" action, individually and as members of classes, alleging that Respondents had deliberately selected sites and issued mortgage loan commitments for the construction of housing projects for low or moderate income persons in Black neighborhoods; deliberately determined not to aid or assist in the placement of Black families in white neighborhoods; failed to provide assis-

tance to families under displaced Project Rehab, and deliberately chose Black ghettos for each of the sites of the Project Rehab (Detroit) housing projects to avoid placement of Black families in white neighborhoods in violation of federal statutes and the Fourteenth Amendment. Further MSHDA assisted in these transgressions by providing financial assistance and other support for HUD, MSHDA and FHA's discriminatory housing projects.

Here, as in Hills, jurisdiction was predicated in part upon 28 U.S.C. 1331 (a), the Fifth, Ninth, Thirteenth and Fourteenth Amendments to the Constitution of the United States, Sec. 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Here, but not as in Hills, jurisdiction was also predicated upon 28 U.S.C. 1331(a), 1343(3) and (4) and the principles of Bivens v. Six Unknown Agents of the

Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999 (1971); Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773 (1946); and Yiamouyiannis v. Chemical Abstracts Service, 521 F.2d 1392 (6th Cir. 1925).

Here, as in Hills, Petitioners sought an injunction against Respondents restraining such racially discriminatory housing practices and requiring Respondents to remedy the past effects of their unconstitutional site selection and tenant-assignment (relocation) procedures by building future federally assisted housing units in predominantly white areas. Here, as in Hills, the District Court granted HUD's motion to dismiss the complaint for lack of jurisdiction and failure to state a claim upon which relief could be granted. Hills v. Gautreaux, supra, at 4482.

In the Hills case, but not in this case, the United States Court of Appeals reversed the order of the district court dismissing the complaint. Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971). In Gautreaux v. Romney, at pages 734 and 735, the Court found jurisdiction under 28 U.S.C. 1331 and the Fifth Amendment to be present based on the Supreme Court decision in Bell v. Hood, supra. That Court also found that HUD, through its Secretary, violated the due process clause of the Fifth Amendment (Bolling v. Sharpe, 347 U.S. 497 (1954) and also violated § 601 of the Civil Rights Act of 1964 (Shannon v. HUD, 436 F.2d 809 (3rd Cir. 1975).

A careful study of the Hills case and the prior decisions of the United States Court of Appeals for the Seventh Circuit and the District Court

reported at 503 F.2d 930; 304 F.Supp. 736; 296 F.Supp. 907; 448 F.2d 731; 332 F. Supp. 366, leads us to conclude, as did the Supreme Court and the United States Court of Appeals for the Seventh Circuit, that Petitioners are entitled to have the District Court decide the merits of the disputes and the particular issues alleged in their First Amended Complaint.

The case of Warth v. Seldin, is clearly distinguishable from the instant matter

In affirming the District Court decision, the Sixth Circuit Court cited as additional authority Warth v. Seldin, supra. However, a careful study of the Warth case will reveal that it is not controlling in the instant cause. In the Warth case, the Court found that the petitioners did not assert on behalf of their members any right of action under the

1968 Civil Rights Act, that they personally had not been denied any constitutional rights afforded under 42 U.S.C. 1983, they had not suffered harm nor were one or more of their members injured, that they had not alleged a contract right protected under 1981 or 1982, and they had alleged no monetary injury to themselves or any assignment of damage claims to their members.

Accepting, as the Court must, the various allegations of Petitioners' First Amended Complaint as true (Warth v. Seldin, 422 U.S. at pages 501-522, Conley v. Gibson, 355 U.S. 41 (1957), and Luearel v. McNair, 453 F.2d 836 (6th Cir. 1971)), the complaint and the record on appeal allege and clearly show that Petitioners have personally sustained injury in fact and that their interests sought to

be protected are arguably within the zone of interest to be protected and regulated by the statutes and constitutional guarantees in question.

Eley and the class he represents are clearly the ultimate beneficiaries of the operating subsidies available to the Second-Hendrie Project, as their rents are reduced if the housing is provided and the subsidies are paid. Moreover, each Petitioner has alleged deprivation of statutory and contract rights which only each such petitioner can claim. Therefore, the Petitioners clearly have a "personal stake" in the outcome of the controversies as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions. Cf. Stanton

v. Stanton, _____ U.S. _____, 95 S.Ct. 1373 (1975).

As recounted above, the allegations of the First Amended Complaint clearly show and demonstrate that petitioners have alleged precisely what Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 90 S.Ct. 827 (1970) and Malamud v. Sinclair Oil Corporation, 521 F.2d 1142 (6th Cir. 1975) require.

Thus, the Warth case is distinguishable and does not squarely address the questions presented by this case.

II

THE IMPORTANT QUESTIONS WERE WRONGLY DECIDED BELOW

The questions that were squarely presented by the facts of this case are the exact questions that this Court impliedly stated in the Hills case, supra and which the Sixth, Seventh and Third Circuit Courts ex-

pressly stated in Garrett v. City of Hamtramck, 503 F.2d 1236 (6th Cir. 1974); Gautreaux v. Chicago Housing Authority, supra; Gautreaux v. Romney, 452 F.2d 124 (7th Cir. 1972); and Gautreaux v. Romney, supra. Cf. Singleton v. Wulff, _____ U.S. _____, 44 L.W. 5213 (July 1, 1976).

The District Court's finding that none of Petitioners are "aggrieved persons" under Title VIII of the Civil Rights Act of 1968 (App. A, infra, pp.17-24) is clearly erroneous and in conflict with Cincinnati Electronics Corporation v. Kleppe, 509 F.2d 1080 (6th Cir. 1975); Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972); Association of Data Processing Service Organizations v. Camp, supra; and Singleton v. Wulff, supra, which are fully applicable to this case.

Also, the District Court's findings that Plaintiffs have no standing to raise the claims set forth in Counts I, III, IV, VI and VII (App. A, infra, pp.12-25), that none of the Plaintiffs are "aggrieved persons" under Title VII that none of the statutes cited in paragraph 1(a) of Count I provide a direct private remedy to Plaintiffs (App. A, infra, pp.17-24), that none of the Plaintiffs have standing to raise the claims set forth in Count III (App. A, infra, pp.17-24) are clearly erroneous and in conflict with Singleton v. Wulff, supra; Garrett v. City of Hamtramck, supra; Trafficante v. Metropolitan Life Insurance Co., supra; Association of Data Processing Service Organizations v. Camp, supra; and NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163 (1958) which are fully applicable to this case.

As a ground for its decision, the District Court found that "Plaintiffs cannot rely for standing upon alleged violations of the civil rights of others", purportedly on the authority of Brown v. Board of Trustees, 187 F.2d 20 (5th Cir. 1951) and Bailey v. Patterson, 369 U.S. 31 (1962).

However, a close reading of the Bailey case will reveal that it is inapposite to the facts of this case.

Although it is the general rule that the federal courts should hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation, like any general rule, this one should not be applied where its underlying justifications are absent. Singleton v. Wulff, 44 L.W. at pp. 5215-16.

Apposite to the present case is Mr. Justice Blackman's statement that:

> "The other factual element to which the Court has looked is the ability of the third party to assert his own right. Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by the default the right's best available proponent. Thus, in NAACP v. Alabama, 357 U.S. 449 (1958), the Court held that the NAACP, in resisting a Court order that it divulge the names of its members, could assert the First and Fourteenth Amendments rights of those members to remain anonymous. the Court reasoned that "[t]o require that [the right] be claimed by the members themselves would result in the nullification of the right at the moment of its assertion." Singleton v. Wulff, 44 L.W. at 5216. Also see Eisenstadt v.Baird, 405 U.S. at

446; Barrows v. Jackson, 346 U.S., at 259.

Application of these principles to the present case quietly yields its proper result. Singleton v. Wulff, supra, and Pierce v. Society of Sisters, 268 U.S. 510 (1928).

For the foregoing reasons, it is submitted that it is appropriate in this case to allow the Petitioners to assert the rights of poor Black families as against governmental deprivation of civil, property and constitutional rights.

THE SIX CIRCUIT COURT'S AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT THAT "PLAINTIFFS' FIRST AMENDED COMPLAINT FAILS . . . TO CONTAIN A SHORT AND PLAIN STATEMENT OF PLAINTIFFS' VARIOUS CLAIMS SHOWING THEY ARE ENTITLED TO RELIEF" CLEARLY CONFLICTS WITH THIS COURT'S DECISIONS OF BELL v. HOOD, CONLEY v. GIBSON, AND HOSPITAL BUILDING CO. v. REX HOSPITAL AND FAR DEPARTED FROM THE ACCEPTED

AND USUAL COURSE OF PLEADING AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

The District Court's determination that the Court lacked jurisdiction and that the Complaint failed to state causes of action is fatally incompatible

A careful study of the opinion amply demonstrates that the District Court dismissed the First Amended Complaint based on a determination that it lacked jurisdiction and that the First Amended Complaint failed to state causes of action. (App. A, infra, pp. 1-46).

In its opinion and order granting Respondents' motion to dismiss, the District Court found that none of the statutes set forth in paragraph 1(a) of Count I of the First Amended Complaint provide a direct and private remedy to Petitioners. Also, the District Court found that Petitioners

did not allege that they were in any way affected and harmed by the conduct of Respondents (App. A, infra, pp. 12-19). These rulings were holdings that there was a lack of jurisdiction to bring Count I. Gautreaux v. Romney, supra, at 733 as cited in the Hills case, supra, at 4482. Cf. Wright, Miller and Cooper, Federal Practice & Procedure: Jurisdiction, ¶ 3531, pp. 185-186, 191, 197 and 205. Also, see Warth v Seldin, supra, at 498-501.

Since the Court must assume jurisdiction to decide whether the allegations state a cause of action, the District Judge's determination that the Court lacked jurisdiction and that the Complaint failed to state causes of action is incompatible. Brown v. Strickler, 422 F.2d 1000 (6th Cir. 1970) and Bell v. Hood, supra.

The District Court's finding that "Plaintiffs' first amended complaint fails . . . to contain a short and plain statement of Plaintiffs' various claims showing that they are entitled to relief" is clearly erroneous and in conflict with Tipler v. E.I. duPont deNemours and Co., 443 F.2d 125 (6th Cir. 1971) and Azar v. Conley, 456 F.2d 1382 (6th Cir. 1972), which are fully applicable to this case.

Also, the District Court's inclusion in the record of affidavits and documents submitted by both parties (exhibits and affidavits of MSHDA and affidavits and exhibits of Petitioners (see reference App. A, infra, pp. 4-12) converted Respondents' Rule 12(b) motions to dismiss to Rule 56 motions for summary judgment, and the District Court's failure to grant Petitioners' Application to Enlarge Time for Hearing

on MSHDA's motions and to afford Petitioners the opportunity to file counter affidavits and take discovery is clearly erroneous and in conflict with the Supreme Court's affirmance of Gautreaux v. Chicago Housing Authority, 503 F.2d 930 (7th Cir. 1974); Gautreaux v. Romney, 452 F.2d 124 (7th Cir. 1972); Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971) and the Supreme Court's statements in Warth v. Seldin, supra, at 501-502 and 526-527 per Brennan, White and Marshal jj, dissenting, which are fully applicable to this case.

The lower court's treatment of the injury in fact requirements directly conflicts with Malamud v. Sinclair Oil Corporation, supra; Trafficante v. Metropolitan Life Insurance Co., supra; Association of Data Processing Service Organizations v. Camp, supra, and Singleton v. Wulff, supra. Hence, any

prudential, nonconstitutional considerations that underlay the Court's disposition of the injury in fact standing requirement in cases such as Warth v. Seldin, are simply inapposite when review is sought under a congressionally enacted statute conferring standing and providing for judicial review. Simon v. Eastern Kentucky Welfare Rights Organization, ____ U.S. ____, 44 L.W. 4724, 4734 (1976), Brennan J., dissenting).

Mr. Justice Brennan in his dissenting opinion made an appropriate comment in Simon v. Eastern Kentucky Welfare Rights Organization, supra, 44 L.W. 4736:

> "The Court's treatment of injury in fact without any 'particularization' in light of either the policies properly implicated or our relevant precedents threatens that it shall 'become a catchall for an unarticulated discretion on the part of

this Court' to insist that the federal courts 'decline to adjudicate' claims that it prefers they not hear. Poe v. Ullman, 367 U.S., at 530 (Harlan, J., dissenting)."

IN HOLDING THAT THE GOVERNMENTAL AGENCIES AND OFFICERS DO NOT FALL WITHIN THE PURVIEW OF THE ANTI-TRUST LAWS, ON THE AUTHORITY OF PARKER v. BROWN, ERRONEOUSLY OR WITHOUT CONSIDERING THE VALIDITY OF THE CLAIMS AGAINST THE PRIVATE RESPONDENTS, THE LOWER COURTS RENDERED DECISIONS IN CONFLICT WITH THE DECISIONS OF THIS COURT ON THE QUESTION OF GOVERNMENTAL IMMUNITY

In support of its decision, the District Court held that:

> "It is well settled that governmental agencies and officers do not fall within the purview of the anti-trust laws, Parker v. Brown, 317 U.C. 341 (1943); Alabama Power Co. v. Alabama Electric Cooperative, Inc., 394 F.2d 672 (5th Cir. 1968). This immunity is not removed by charging a conspiracy between governmental and private parties. Saenz v. University Interscholastic League, 487 F.2d 1026 (5th Cir. 1973). Although there are five private party-defendants listed in the caption of this action, there are no allegations of any acts by any of the private individuals which are in restraint of trade." (App. A, infra, pp. 34-37).

The very language of Count XII of the First Amended Complaint reveals that the District Court's finding that there are no allegations of any acts by any private individuals which are in restraint of trade is clearly erroneous. (Paragraphs 177 through 182 of the First Amended Complaint).

Moreover, the cases cited by the District Court in support of its Opinion are not applicable by reason of the waiver of sovereign immunity under 12 U.S.C. §1702, 42 U.S.C. 3939, and the recent Supreme Court decision of Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 204, 215 (1975).

In Cantor v. The Detroit Edison Company, _____ U.S. _____, 44 L.W. 5357 (July 6, 1976), the District Court

entered a summary judgment against petitioner, holding on the authority of Parker v. Brown, supra, that the Michigan Public Service Commission's approval of the respondent's light-bulb marketing practices exempted the practices from the federal anti-trust laws, and the Court of Appeals, Sixth Circuit, affirmed. 513 F.2d 630 (6th Cir. 1975). Mr. Justice Stevens, in delivering the opinion of the Court in Cantor stated that neither Michigan's approval of respondent's present tariff nor the fact that the light-bulb exchange program may not be terminated until a new tariff is filed, is sufficient basis for implying an exemption from the federal anti-trust laws for that program. Mr. Justice Stevens further stated that the State of Michigan's participation in the decision to have a light-bulb exchange

program is not so dominant that it is unfair to hold a private party responsible for its conduct in implementing the decision, but rather the respondent's participation in the decision is sufficiently significant to require that its conduct, like comparable conduct by unregulated businesses, conform to applicable federal law.

In the recent case of Hospital Building Company,y v. Trustees of the Rex Hospital, _____ U.S. _____, 44 L.W. 4683 (May 24, 1976), petitioner brought a suit under § 1 and 2 of the Sherman Act alleging that respondents were engaged in an unlawful conspiracy to restrain trade and commerce in the furnishing of medical and surgical hospital services, and that they were attempting to monopolize the hospital business in the Raleigh, N.C., Metropolitan area. The District

Court dismissed petitioner's amended complaint on the pleadings. The Court of Appeals for the Fourth Circuit, sitting en banc, affirmed the judgment of the District Court. The Supreme Court granted certiorari and reversed the lower courts, and held that the amended complaint when fairly read, adequately alleged a restraint of trade substantially affecting interstate commerce and that the dismissal on the pleadings of petitioner's amended complaint was therefore inappropriate. Mr. Justice Marshal in delivering the opinion of the Court stated that:

> "We have held that 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1967) (footnote

> omitted). And in anti-trust cases where 'the proof is largely in the hands of the alleged conspirators', Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962), dismissals prior to giving the plaintiffs ample opportunity for discovery should be granted very sparingly. Applying this concededly rigorous standard, we conclude that the instant case is not one in which dismissal should have been granted. Petitioner's complaint states a claim upon which relief can be granted under the Sherman Act. (footnote omitted). Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion." Hospital Building Co., v. Trustees of Rex Hospital, (supra), 44 L.W. at 4685.

In United States v. Nat'l Assn of Securities Dealers, the Court pointed out:

> "Implied anti-trust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the anti-trust laws and the regulatory system. See e.g. United States v.

Borden Co., 308 U.S. 188, 197-206 (1939)." 422 U.S. 694, 720.

Furthermore, the Court in Cantor v. The Detroit Edison Company stated:

> "In the Court's most recent consideration of this subject, it described the defendant's claim with pointed precision as 'this so-called state action exemption.' Goldfarb v. Virginia State Bar, 421 U.S. 773, 778. The Court then explained that the question whether the anti-competitive activity had been required by the state's acting as sovereign was the 'threshold inquiry' in determining whether it was state action of the type the Sherman Act was not meant to prescribe. Certainly that careful use of language could not have been read as a guarantee that compliance with any state requirement would automatically confer federal anti-trust immunity.
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> It surely does not qualify the categorical statement in Parker that 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it or by declaring that their action is lawful. 317 U.S. at 351.
>
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> Although it is tempting to try to fashion a rule which would govern the decision of the liability issue and the damage issue in all future cases presenting state action issues, we believe that the court should adhere to its settled policy of giving concrete meaning to the general language of the Sherman Act by a process of case-by-case adjudication of specific controversies.
>
> Since the District Court has not yet addressed the question ofwhether the complaint allege a violation of the anti-trust laws, the case is remanded for a determination of that question and for such other proceedings as may be appropriate." 44 L.W. at 5363-5364.

It is well settled that the judicially created exemption of immunity for state approved transactions may not be invoked when governmental agents or instrumentalities of governments act outside their scope of authority. Union Carbide and Carbon v. Nisley, 300 F.2d 561, 576-77 (10th Cir. 1961) cert. dism'd sub nom. Wade v. Union Carbide and Carbon Corp., 371 U.S. 801 (1962);

nor may state officials claim anti-trust immunity for acts which exceed the authority vested them by law, Alabama Power Company v. Alabama Elec. Coop, 394 F.2d 672, 675 (5th Cir. 1968) cert. denied 393 U.S. 100 (1968).

There is no authority, statutory or otherwise, authorizing state officials to conspire with persons to restrain commerce or exempting them from suit if they so conspire. Bankers Life & Casualty Co. v. Larson, 257 F.2d 377 (5th Cir. 19___), cert. denied 358 U.S. 879 (1958). Furthermore, a proprietary or business function of the state, as contrasted with a governmental function, is divested from a state's sovereignty. Opinion of the Attorney General of Georgia, 1948-1949 Trade Cases, ¶ 62, 455 (June 14, 1949). Also see 16L Business Organizations, §102.01 at page 102-4; Continental

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Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); United States v. Sisal Sales Corp., 274 U.S. 268 (1927) (foreign officials); Harman v. Valley National Bank, 399 F.2d 564 (9th Cir., 1964); and Independent Taxicab Operators' Ass'n v. Yellow Cab Co., 278 F. Supp. 979, 983 (N.D. Cal. 1968).

Count XII of Petitioners' First Amended Complaint specifically alleges that the Respondents have exceeded their authority (¶ 177), conspired to control § 236 Rehab (Detroit) Housing Projects and Developments, and that the Respondents, including MSHDA and five (5) private corporations, are engaged in the rehabilitation, construction and financing of low to moderate income housing or developments of a proprietary or business nature, in competitive areas of the economy, (¶ 178 and 182), Advisory Opinion re Consti-

tutionality, P.A. 1966, No. 346, 380 Mich. 554 (1968) at page 585, in violation of the anti-trust laws.

Here, as in Cantor v. The Detroit Edison Company, since the lower courts erroneously or did not consider the validity of the claims against the private corporations and erroneously determined that the governmental agencies and officers were immune from the anti-trust laws, it is clear that Count XII alleges acts sufficient to assert a claim upon which relief can be granted and that the Respondents are not immune or exempt in any respect under the anti-trust laws.

THIS PETITION RAISES SUBSTANTIAL AND IMPORTANT QUESTIONS CONCERNING THE STANDARDS APPLICABLE TO TESTING THE SUFFICIENCY OF A COMPLAINT FOR SUBJECT MATTER JURISDICTION UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

This Petition raises substantial

and important questions concerning pleadings practice in the federal courts. The Petition for Writ of Certiorari should be granted to settle the present conflict in the law concerning the pleading requirements sufficient to survive a motion to dismiss for lack of standing and the apparent conflict in this Court's decisions between Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Hospital Building Co. v. Trustees of the Rex Hospital, _____ U.S. _____, 44 L.W. 4683 (May 24, 1976); Warth v. Seldin, 422 U.S. 490, _____ S.Ct. 2197, _____ (1975), and Simon v. Eastern Kentucky Welfare Rights Org., _____ U.S. _____, 44 L.W. 5213 (July 1, 1976).

Respondents' motion to dismiss asserted that the District Court had no jurisdiction over the subject matter of the Amended Complaint, Fed.R.Civ.P.

12(b)(1), and that the Amended Complaint failed to state a claim upon which relief could be granted, Fed.R.Civ.P. 12(b)(6). Petition for Writ, pp. supra. The District Court granted the motion to dismiss, concluding that Petitioners lacked standing to bring the suit, that the Complaint failed to state claims upon which relief could be granted, on the ground, inter alia, that: "The First Amended Complaint fails . . . to contain a short and plain statement of Plaintiffs' various claims showing that they are entitled to relief."

For purposes of testing the sufficiency of a complaint, the Court must accept its allegations as being true. Gardner v. Toilet Goods Ass'n., 387 U.S. 167 (1967).

Up until 1975, it was settled law

in the federal courts that:

> "A complaint should not be dismissed for failure to state a claim upon which relief can be granted, unless it is certain that the plaintiff can prove no state of facts in support of its allegations that would entitled plaintiff to relief. Conley v. Gibson, 355 U.S. 41 (1957)."

Also, it is well settled law of the federal courts that an action brought under the civil rights statutes requires the reviewing court to scrutinize any such dismissal of a complaint with special care, Azar v. Conley, 456 F.2d 1382, 1384 (6th Cir. 1972), and that the reviewing court, following dismissal of a complaint, has a duty to review the allegations of the complaint in the light most favorable to the plaintiffs. Conley v. Gibson, supra; Luearel v. McNair, 453 F.2d 836 (6th Cir. 1971); and L'Orange v. Medical Protective Company, 394 F.2d 57 (6th

Cir. 1968).

The conflict of the Supreme Court decisions concerning the standards applicable to testing the sufficiency of a complaint for subject matter jurisdiction is demonstrated by Mr. Justice Brennan's dissent, with whom Mr. Justice White and Mr. Justice Marshal joined, in Warth v. Seldin, supra, as follows:

> "The Court today, in an opinion that purports to be a "standing" opinion but that actually, I believe, has overtones of outmoded notions of pleading and of justiciability, refuses to find that any of the variously situated plaintiffs can clear numerous hurdles, some constructed here for the first time, necessary to establish "standing". While the Court gives lip-service to the principle, oft-repeated in recent years, that 'standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal', ante, at 2206, in fact the opinion, which tosses out of court almost every

> conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional, can be explained only by an indefensible hostility to the claim on the merits. I can appreciate the Court's reluctance to adjudicate the complex and difficult legal questions involved in determining the constitutionality of practices which assertedly limit residence in a particular municipality to those who are white and relatively well-off, and I also understand that the merits of this case could involve grave sociological and political ramifications. But courts cannot refuse to hear a case on the merits merely because they would prefer not to and it is quite clear, when the record is viewed with dispassion, that at least three of the groups of plaintiffs have made allegations, and supported them with affidavits and documentary evidence, sufficient to survive a motion to dismiss for lack of standing. (footnotes omitted).
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> To require them to allege such facts is to require them to prove their case on paper in order to get into court at all, reverting to the form of fact-pleading long abjured in

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> the federal courts. This Court has not required such unachievable specificity in standing cases in the past, see Scrap, supra, and Jenkins, supra and the fact that it does so now can only be explained by an indefensible determination by the Court to close the doors of the federal courts to claims of this kind." 95 S.Ct. 2216 and 2220.

Furthermore, the comment of Mr. Justice Brennan, with whom Mr. Justice Marshal joined, concurring in the judgment and dissenting in Simon v. Eastern Kentucky Welfare Rights Organization, 44 L.W. 4733, at n. 6, is apposite to this issue:

> "One waits in vain for an explanation for this selectivity imposed pleading requirement; a requirement so at odds with our usual view that under the Federal Rules of Civil Procedure 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief'. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The want of an explanation is even more striking

> when considered in light of our reaffirmation of Conley only this Term, Hospital Building Co. v. Trustees of the Rex Hospital, ____ U.S. ____, ____ (1976), and our observation therein that the same standard is applicable to testing the sufficiency of the complaint for subject matter jurisdiction."

In the instant case, when the First Amended Complaint is viewed with dispassion, it is quite clear that all Petitioners have made allegations sufficient to survive a motion to dismiss for lack of standing. Therefore, in order to prevent such a patently incongruous state of the law in an area as vital as the standard applicable to testing the sufficiency of a complaint for subject matter jurisdiction, Petitioners urge this Court to grant the Petition for Writ of Certiorari so that the conflict in this Court's decisions may be settled.

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The decisions of the United States

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Supreme Court are binding upon federal courts on appeal until such time as the Supreme Court informs the federal courts that they are not. Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974). Also see 1B Moore's Federal Practice, ¶ 0.402 generally.

Although we find no case in point in the Sixth Circuit Court of Appeals, it is well established that one panel of a Court of Appeals may not disregard a precedent set by a prior panel, even though it conceives error in the precedent. Absent an overriding Supreme Court decision or a change in the statutory law, only the court in banc can do so. Cf. Davis v. Estelle, 529 F.2d 437 (5th Cir. 1976); United States v. Hawes, 529 F.2d 742 (5th Cir. 1976), and United States v. Olivares-Vega, 495 F.2d 827 (2nd Cir. 1974). Also cf. Hudgens v. N.L.R.B., _____ U.S. _____, 96 S.Ct. 1029 (1976).

(App. A, infra, pp.10-14). To do so constitutes an encroachment upon the functions of the legislative body, as recognized through the time-honored principle of the separation of powers of the three branches of our federal governments.

Accordingly, as appears on the face of the District Court's Opinion and Judgment (App. A, infra, pp.1-46), the dismissal of Petitioners' First Amended Complaint by the Courts below constituted clear error and an abuse of discretion. Not only were the lower courts' judgments erroneous, but they were also counterproductive in the sensitive and controversial circumstances of the case before this Court.

We pray, that this Court will not be diverted from its appointed task of making "a living truth" of our constitutional ideal of equal justice under

The decisions of the lower courts herein conflict with the decisions of the United States Court of Appeals for the Third, Sixth and Seventh Circuits, supra, and the Supreme Court, supra, therefore consideration by this Court of this case is necessary to secure and maintain uniformity with the aforesaid decisions.

The Supreme Court in Griswold v. Connecticut, 381 U.S. 479 at 482 (1965), Mr. Justice Douglas, speaking for the Court, said:

> "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."

It is clear that the federal courts do not have jurisdiction and power to determine the wisdom, need and propriety of actions that touch economic problems, business affairs or social conditions, as did the trial court in rendering its Opinion and Judgment

law. Cf. Cooper v. Aaron, 358 U.S. 1, 20 (1958).

CONCLUSION

For the foregoing reasons, Petitioners respectfully urge that:

A. Their Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit; and

B. Upon consideration by this Honorable Court, the Judgments of the United States Court of Appeals for the Sixth Circuit and the District Court be reversed.

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